



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

April 30, 2019 Government Records Council Meeting

Edwin Sheppard
Complainant

Complaint No. 2019-3

v.

County of Cape May
Custodian of Record

At the April 30, 2019 public meeting, the Government Records Council ("Council") considered the April 23, 2019 Findings and Recommendations of the Council Staff and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that this complaint should be referred to the Office of Administrative Law for a determination of whether the Complainant's objections to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esquire, is valid, and if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as counsel for the County of Cape May in the instant complaint. Moreover, based on the conflicting evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. As such, this complaint should also be referred to the Office of Administrative Law for a hearing to resolve the facts and determine whether the Custodian unlawfully denied access to the records relevant to the complaint, and if so, to order disclosure of said records and determine whether the Custodian and/or the Custodian's Counsel knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is/are therefore personally subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Interim Order Rendered by the
Government Records Council
On The 30th Day of April 2019

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: May 2, 2019

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Council Staff
April 30, 2019 Council Meeting**

**Edwin Sheppard¹
Complainant**

GRC Complaint No. 2019-3

v.

**County of Cape May²
Custodial Agency**

Records Relevant to Complaint:

Item number 1: “Disbursements of \$32,000 in grant funds.”

Item number 2: “Disbursements of \$14,000 in grant funds.”

Item number 3: “Disbursements of \$47,000 in grant funds.”³

Custodian of Record: Elizabeth Bozzelli

Requests Received by Custodian: April 23, 2018

Response Made by Custodian: May 2, 2018

GRC Complaint Received: January 3, 2019

Background⁴

Requests and Response:

On April 23, 2018, the Complainant submitted two (2) Open Public Records Act (“OPRA”) requests to the Custodian seeking the above-mentioned records. On May 2, 2018, the seventh (7th) business day following receipt of said request, the Custodian’s Counsel responded in writing informing the Complainant that the records responsive to his requests were attached. Four (4) pdf documents were attached to the response: (1) OPRA Request 2475-18 & 2476-18, (2) OPRA Request 2477-18 & 2478-18, (3) OPRA Request 2479-18, and (4) OPRA Request 2480-18.⁵

¹ No legal representation listed on record.

² Represented by Jeffrey R. Lindsay, Esq. (Cape May Court House, NJ).

³ These items are not listed as “request items” because they were never specifically identified in the requests. The Complainant’s OPRA requests were overly broad requests which sought records related to State Wide Respite Grants accepted by Cape May County on January 24, 2017 (49-17) and February 27, 2018 (161-18). The requests contained identical language: “I request copies of any and all payments made to any and all vendors, contracted firms, caregivers, county employees, independent contractors, and/or the NJ Department of Human Services from this grant ...” However, notwithstanding the overly broad nature of the requests, the Custodian decided to respond to the requests.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Council Staff the submissions necessary and relevant for the adjudication of this complaint.

⁵ These appear to be agency tracking numbers assigned to the OPRA requests; however only two (2) requests formed the basis of this complaint, those identified as tracking number 2475-18 and tracking number 2476-18. All of the pdf documents were stored on a compact disc which is included in the GRC’s case file.

Denial of Access Complaint:

On January 3, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that the records relevant to the complaint listed as items number 1 and 3 were never disclosed. The Complainant asserted that the records relevant to the complaint listed as item number 2 were incomplete.

The Complainant informed the GRC to “[s]ee attached summary, copy of response, email chain associated with the response.” The Complainant failed to attach a summary; however, he did attach an e-mail chain which reflected his reply to the response. In the e-mail chain, the Complainant expressed his belief that the Custodian failed to disclose to him all of the records responsive to his requests. In an e-mail to the Custodian’s Counsel dated May 15, 2018, the Complainant stated, “... it appears there are ... records missing from 2475-18 and 2478-18.” In the same e-mail he stated, “[the] large difference between monies accepted and ... monies paid out leads me to believe that there are records responsive to this request that you failed to provide.”

The majority of the content of the e-mails within the referenced chain contains criticism of the Custodian’s Counsel. The Complainant leveled accusations at the Custodian’s Counsel for what appear to be past interactions between the Complainant and Counsel. Since the GRC has no knowledge of the past interactions, it cannot relate same to the instant complaint. It is quite apparent though, from the content of a May 3, 2018 e-mail between the Complainant and Counsel, that the Complainant believes his reasonable expectation of privacy had been violated by the Custodian’s Counsel.

The Complainant attached two hundred fifty-one (251) pages of documents to the complaint. However, the Complainant failed to reference any of the pages of documents as an exhibit or exhibits, or otherwise specifically relate them to the complaint.

Statement of Information:

On January 14, 2019, the Custodian filed a Statement of Information (“SOF”). The Custodian certified that she received the Complainant’s OPRA requests on April 23, 2018. The Custodian certifies that the following records are responsive to the Complainant’s request:

- Records of payments made Statewide Respite January 1, 2017 to December 31, 2017, consisting of 119 pages.
- Records of authorizations for services to be paid by Statewide Respite Grant in 2017, consisting of 78 pages.
- Internal records used to verify sufficient funds are in account for payment in 2017, consisting of 5 pages.
- Non-responsive records for 2017 paid through Social Services Block Grant, consisting of 6 pages.
- Billing statements and vouchers for payments January 1, 2018 to April 20, 2018, consisting of 9 pages.
- Internal records used to verify sufficient funds are available for payment of services in 2018, consisting of 2 pages.

- Non-responsive records mistakenly produced; these are paid through Aging Respite, not Statewide Respite Grant for 2018, consisting of 3 pages.
- Non-responsive records for 2018 paid through Social Services Block Grant not Statewide Respite Grant, consisting of 11 pages.

The Custodian certified that all of the responsive records were disclosed to the Complainant. The Custodian's Counsel stated that the County did not withhold any records responsive to the Complainant's request. Counsel further stated that it is not clear how the Complainant determined the amounts of alleged missing disbursements and authorizations set forth in the complaint, but that the Complainant must have based his allegations of missing records upon a misunderstanding of the records.

Additional Submissions:

On January 14, 2019, the Complainant e-mailed the GRC. The Complainant stated that he noted that Elizabeth Bozzelli was listed in the SOI as the Custodian but that the Custodian's Counsel signed the SOI instead of the Custodian. The Complainant inquired as to the identity of the Custodian, i.e., whether the Custodian is Ms. Bozzelli or Counsel. The Complainant also stated that it is not a matter of his misunderstanding the records, but rather that the County did not provide the requested records. The Complainant also inquired as to the identity of Lori Harris, a person who was copied on the e-mail transmitting the SOI to the GRC. The Complainant stated that his personal information was included in the SOI and he is concerned that the information was improperly shared with Ms. Harris. The Complainant also informed the GRC that he objected to the Custodian's Counsel representing the Custodian in GRC Complaint No. 2016-195, and he is renewing his objection with respect to Counsel's representation in the instant complaint.

On January 15, 2019, the GRC replied to the Complainant's January 14, 2019 e-mail. The GRC advised the Complainant that the SOI listed Elizabeth Bozzelli as the Custodian and Mr. Lindsay as the Custodian's Counsel. The GRC copied the Custodian's Counsel on the e-mail, advising him that N.J.A.C. 5:105-2.4(a) requires the Custodian to sign the SOI. The GRC therefore asked Counsel to resubmit the appropriate pages of the SOI in compliance with the regulation. With respect to the Complainant's objection to Counsel's representation, the GRC informed the Complainant to follow the provisions set forth in N.J.A.C. 5:105-2.4(j).⁶ Finally, the GRC advised the Complainant that the GRC does not have any information concerning Lori Harris; however, based upon her e-mail address the Complainant was informed that it appears she is a Cape May County employee.

On January 15, 2019, the Complainant forwarded to the GRC a document dated October 17, 2018, together with proof that it was submitted as part of the Denial of Access Complaint. The October 17, 2018 submission states that it applies to OPRA Request tracking numbers 2475-18 and 2478-18.⁷ In the submission the Complaint stated that he is asking the GRC for the following relief:

⁶ The GRC provided the Complainant with a link to the GRC's website where the regulations may be found.

⁷ OPRA Request tracking number 2478-18 is not a request which formed a basis for the instant complaint.

- To order the Custodian to immediately provide the requested records in their entirety. The Complainant stated that he believes more records exist because when totaling the dollar amount of the disbursements in the response to 2475-18, they only add up to \$79,000. Since it was a \$111,180 grant, the Complainant asserted that the response failed to include records for roughly \$32,000. The Complainant also asserted that in addition to the \$32,000 there is another \$14,000 in which the records provided were incomplete.
- To fine the Custodian's Counsel for failure to comply with the law and provide the requested records, and for violating his reasonable expectation of privacy by giving out his personal contact information.
- To ban the Custodian's Counsel from participating in any of the Complainant's OPRA matters.
- To ban the Custodian's Counsel from "participating in any OPRA matter for any government entity ever again."

The Complainant further stated that the Custodian's Counsel had twice taken the personal contact information from an OPRA request he filed and provided it to a third party who had nothing to do with the OPRA request. The Complainant stated that his privacy information has been compromised, specifically his unlisted cell phone number and home address. As a result, the Complainant alleged that the third party is now stalking him.

On January 15, 2019, the GRC forwarded to the Custodian's Counsel the Complainant's October 17, 2018 submission. The GRC informed Counsel that the submission is part of the original complaint, and asked Counsel to have the Custodian supplement the SOI accordingly.

On January 21, 2019, the Complainant submitted an objection to Jeffrey R. Lindsay, Esq. as Counsel for the Custodian in this complaint. The Complainant stated that Counsel has twice taken the personal contact information from an OPRA request he filed and provided it to a third party who had nothing to do with the request. The Complainant stated that the Custodian's Counsel offered no apology to him, and for that reason the Complainant believes he will again disclose his personal information. The Complainant stated that if Mr. Lindsay is removed he will not have access to the Complainant's personal information and will not be in a position to disclose it to third parties. On January 30, 2019, the GRC replied to the Complainant, informing him that his concerns would be brought to the attention of the Council.

On February 11, 2019, the Custodian's Counsel forwarded to the Complainant via e-mail a legal certification prepared by Donna Groome, the Department Head of the County's Department of Human Services.⁸ Counsel stated that the certification will clarify the Complainant's misunderstandings of the records produced in response to his OPRA requests.⁹

⁸ The certification is attached as Exhibit A.

⁹ During the month of February 2019 there were other e-mails between the Complainant and the Custodian's Counsel upon which the GRC was copied. Those e-mails add nothing further to the substance of this complaint; Counsel assures the Complainant that all responsive records have been disclosed to him and the Complainant maintains that the Custodian has unlawfully denied him access to the records, either in whole or in part.

Analysis

Objections to Representation

The Administrative Procedures Act (“APA” or “the Act”), N.J.S.A. 52:14B-1 to -31, establishes the process and procedures by which administrative agencies carry out their regulatory functions. Administrative agencies possess wide latitude [under the Act] in selecting the appropriate procedures to effectuate their regulatory duties and statutory goals.” St. Barnabas Medical Center v. N.J. Hosp. Rate Setting Comm’n, 250 N.J. Super. 132, 142 (App. Div. 1991); Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 333 (1984); In re the Petition By Controlled Cable Corp., 95 N.J. 473, 485 (1984); In re Kallen, 92 N.J. 14, 24–25 (1983); Texter v. Dep’t of Human Serv., 88 N.J. 376, 385 (1982); Bd. of Educ. of City of Plainfield v. Cooperman, 209 N.J. Super. 174, 207 (App. Div. 1986) (modified, 105 N.J. 587, 523 (1987)). Administrative agencies effectuate out their regulatory responsibilities through rulemaking, adjudication of contested cases, and informal administrative action. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm’n, 234 N.J. 150, 161 (2018); In re Carberry, 114 N.J. 574, 584-85, (1989); In re Unif. Admin. Procedural Rules, 90 N.J. at 93-94 (1982).

GRC regulations promulgated under the APA and OPRA provide “procedures for the consideration of complaints filed pursuant to [OPRA].” Objections to representation are provided for in N.J.A.C. 5:105-2.4(j), which states in relevant part that “ ... [o]bjections to a party’s representative by another party, and a party’s response thereto, to the complaint must be in writing, presented to the Council, served on all parties, and include:

1. The Council’s case reference name and number;
2. Clear identification of the representative in question; and
3. A detailed explanation of the reasons for the objections, or conversely the response to such objections.

Id.

Notwithstanding the process set forth above, the remainder of the regulations are silent on the mechanism by which the Council has the authority to render a decision on disqualification of a party’s representative: the Uniform Administrative Procedure Rules address such an issue.

In any case where the issue of an attorney’s ethical or professional conduct is raised, the judge before whom the issue has been presented shall consider the merits of the issue raised and make a ruling as to whether the attorney may appear or continue representation in the matter. The judge may disqualify an attorney from participating in a particular case when disqualification is required by the Rules of Professional Conduct or the New Jersey Conflict of Interest Law. If disciplinary action against the attorney is indicated, the matter shall be referred to the appropriate disciplinary body.

[N.J.A.C. 1:1-5.3.]

In his January 21, 2019 e-mail containing his objections to Jeffrey R. Lindsay, Esq. as Counsel for the Custodian in this complaint, the Complainant properly captioned the complaint with the case name and number. The Complainant presented his objections to representation to the Council via e-mail to the GRC staff, and served all parties via delivery of copies of the e-mail to the Custodian and the Custodian's Counsel. The Complainant clearly identified Jeffrey Lindsay as the Custodian's representative to whom he was objecting, and set forth in detail the reasons for his objections. There was no response to the objections pursuant to N.J.A.C. 5:105-2.4(k).

The threshold issue in this complaint then, is whether the Complainant's objections to representation have merit. However, there is no mechanism provided for in N.J.A.C. 5:105, et seq. for the Council to act upon such objections to representation. It is clear though, in the interest of due process, that there should be a hearing to resolve the facts and settle the allegations made pursuant to the regulation.

Accordingly, it is necessary to refer this matter to the Office of Administrative Law ("OAL") for a determination of whether the Complainant's objections to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esquire, is valid. And if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as counsel for the County of Cape May in the instant complaint.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Here, the Complainant has alleged that the Custodian unlawfully denied him access to the records relevant to the complaint. Conversely, the Custodian certified that she disclosed to the Complainant all of the responsive records.

In Rivera v. City of Bayonne (Hudson), 2012-86, GRC Complaint No. 2012-86 (Interim Order January 29, 2013), the custodian stated that he disclosed to the complainant all of the requested records. The complainant, however, asserted that only some of the requested records were disclosed to him. Due to the conflicting evidence of record, the Council referred the complaint to the OAL for a hearing to resolve the facts and determine whether the custodian disclosed the requested records to the complainant.

Therefore, based on contradictory facts in the Custodian's and Complainant's submissions, there is conflicting evidence regarding whether the Custodian disclosed the requested records. The Administrative Procedures Act provides that the OAL "shall acquire jurisdiction over a matter only after it has been [determined] to be a contested case by an agency head and has been filed with the [OAL]" N.J.A.C. 1:1-3.2(a). Therefore, it is necessary to refer this matter to the

Office of Administrative Law for a hearing to resolve the facts and determine whether the Custodian disclosed the requested records in full or in part.

Accordingly, this complaint should be referred to the OAL for a determination of whether the Complainant's objections to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esquire, is valid, and if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as counsel for the County of Cape May in the instant complaint. Moreover, based on the conflicting evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. As such, this complaint should also be referred to the OAL for a hearing to resolve the facts and determine whether the Custodian unlawfully denied access to the records relevant to the complaint, and if so, to order disclosure of said records and determine whether the Custodian and/or the Custodian's Counsel knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is/are therefore personally subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Conclusions and Recommendations

The Council Staff respectfully recommends the Council find that this complaint should be referred to the Office of Administrative Law for a determination of whether the Complainant's objections to representation of the Custodian in this matter by Jeffrey R. Lindsay, Esquire, is valid, and if so, whether Mr. Lindsay should therefore withdraw or be removed for cause as counsel for the County of Cape May in the instant complaint. Moreover, based on the conflicting evidence in this matter, the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records. As such, this complaint should also be referred to the Office of Administrative Law for a hearing to resolve the facts and determine whether the Custodian unlawfully denied access to the records relevant to the complaint, and if so, to order disclosure of said records and determine whether the Custodian and/or the Custodian's Counsel knowingly and willfully violated OPRA and unreasonably denied access to the requested records under the totality of the circumstances and is/are therefore personally subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

Prepared By: John E. Stewart
Staff Attorney

April 23, 2017

EXHIBIT A

Edwin Sheppard	:	GOVERNMENT RECORDS COUNCIL
	:	STATE OF NEW JERSEY
Claimant,	:	
	:	COMPLAINT NO.: 2019-3
v.	:	
Cape May County	:	Certification of Donna Groome
	:	
Custodian.	:	

I, Donna Groome, hereby certifies as follows:

1. I have served as the Department Head of the Cape May County Department of Human Services since January 6, 2017 and, as such, have personal knowledge of the information contained herein.

2. I reviewed Mr. Sheppard's October 17, 2018 denial of access complaint for OPRA Requests 2475-18 and 2478-18 and provide this certification to clarify his misunderstanding of the Statewide Respite Care Records produced to him.

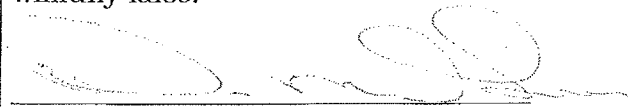
3. I do not agree with Mr. Sheppard's calculation of expenditures. The payments produced in response to the above OPRA requests also included back-up print-outs from our financial system. Without looking at Mr. Sheppard's detailed calculations, I can only assume that he double-counted payments as he was unfamiliar with the documentation that he was reviewing.

4. Here are my findings that have been verified with the Cape May County Department of Human Services fiscal unit, the Cape May County Treasurer's Office and he NJDHS, DoAS SRCP:

\$111,180.00	Resolved Grant Amount
- 4,000.00	Estimated Client Cost Share that is not utilized for direct service or staff that was included in the grant application
107,180.00	Actual grant ceiling without cost share
49,767.81	Expenditures for direct care
+ 9,197.23	Expenditures for staff salary
+3,755.02	Expenditures for fringe for staff
+1,498.32	Caregiver books for Health Fair and Disabilities Awareness Day from cost share
64,218.38	Actual Total Expenditures (not the \$79,000 calculated by Mr. Sheppard)
107,180.00	Actual grant ceiling
- 64,218.38	Total expenditures
\$42,931.62	Balance (underspent not \$32,000 calculated by Mr. Sheppard)

5. The total amount of the grant is not up-fronted to the County of Cape May. The grant is a reimbursement with a portion of the amount up-fronted.
6. The NJ Department of Human Services, Division of Aging Services (NJ DHS, DoAS), deemed that \$60,936 [$\$64,218.38$ (total expenditures) - $\$3,283.42$ (cost share received)] were allowable under the SRCP.
7. The total funds provided to the County of Cape May, according to the close-out email dated June 6, 2018 from the NJ DHS, DoAS, was \$62,510. The amount of \$1,574 was returned to the NJ DHS, DoAS on July 24, 2018.
8. Mr. Sheppard also indicated that there is approximately \$14,000 that had incomplete records with just a print-out of three checks being issued. It is unclear what he is referencing here. In reviewing the records produced the only document that I could identify relating to this amount is the "County of Cape May Detail Budget Transaction Inquiry By Account" print-out that lists 14 transfers with three column totals that total \$14,450.57.
9. The first and third sections relate to staffing the SRCP 2017. The first section indicates the amount transferred to offset the salary of the staff involved with the program. This total is \$9,197.23. The third section is similar and offsets the fringe costs of the staff involved in the program. This total is \$3,755.02. There are "2017 Salary and Wage Transfer Forms" and on the back of that form a corresponding "2017 Fringe Transfer Form" that totals \$12,952.25 that were included as part of the OPRA request. Authorizations are not utilized for salary and wage or fringe.
10. The second section is a payment to Barnes and Nobel for \$1,498.32. This payment was for caregiver support books utilized at a Health Fair and Disabilities Awareness Day to promote the SRCP. These books were an allowable expense from the cost share. The purchase of the books did not require authorizations.
11. Mr. Sheppard asserts that there is missing documentation due to only having authorizations for approximately \$64,000. The total grant expenditures, with salary and wage and fringe transfers, was \$64,218.38. As a former provider of SRCP services Mr. Sheppard is aware that authorizations are higher than the actual service costs as the authorizations must take into consideration a fifth week, even though that rarely happens. Additionally, clients have many circumstances where they would not utilize the fully authorized service including: being admitted into the hospital, short-term rehabilitation, or having family visit. Additionally, authorizations are not required for salary and wage or fringe transfers or purchases to promote the SRCP from the cost share. The estimated authorizations for \$64,000 is not unreasonable based on the total actual expenditures, as well as, knowing that authorizations will not be totally accurate due to the above mentioned factors.
12. In my review of the records produced, as well as verifying the information contained therein with the Cape May County Department of Human Services fiscal unit, the Cape May County Treasurer's Office and the NJ DHS, DoAS SRCP, I am confident that Mr. Sheppard's complaint is without merit.

I hereby certify that the foregoing statements made by me are true and accurate to the best of my knowledge. I understand that I am subject to punishment if any of the foregoing is willfully false.



Donna Groome

2/11/19
Date